

N. KEITH CHAMBERS
EXECUTIVE DIRECTOR

February 17, 2010, May 19, 2010, July 7, 2010, and August 4, 2010 orders concerning Complainant's discovery requests. Respondent also failed to appear for the August 4, 2010, status hearing and to respond to Complainant's August 18, 2010, motion for sanctions.

3. On October 20, 2010, a default order was entered against Respondent. The facts cited in Complainant's complaint were admitted as per the default order.

4. On or around March 23, 2004, Respondent hired Complainant as a taxi cab driver and she was employed there until November 21, 2007. On or around December 6, 2007, Complainant resumed her employment with Respondent until her termination on February 29, 2008.

5. Complainant is a transsexual who presents and identifies as female, although her designated sex at birth was male.

6. By May 11, 2004, Complainant legally changed her name to Venessa and started to dress as a female.

7. Complainant was assigned a taxi cab by Respondent.

8. On February 1, 2008, the starter on Complainant's assigned taxi cab was not operational. Gordon Simic ("Simic"), president and owner of Respondent, told Complainant she would have to pay the \$85.00 repair cost, unlike his practice with similar situated employees. On February 3, 2008, Complainant paid \$85.00 for the repair and was given a receipt. (Complainant's Exhibit A).

9. On February 29, 2008, Complainant's taxi cab was not operable. Complainant contacted Simic for assistance to transport the taxi cab to Respondent's garage for repair. Simic refused to assist Complainant and ordered her to return the taxi cab to the garage at her expense or face termination. When Complainant responded, "Aren't you supposed to help me get this back in?" Simic replied, "In your case, no."

10. The February 29, 2008, telephone conversation continued with Simic telling

Complainant that she was a "piece of shit" and a "freak." Simic also told Complainant that Respondent was "losing customers because Complainant was a transsexual" and that the "mechanics thought she was a big joke and laughed about her all the time." Simic then called her an "abomination" and said he was "glad to get rid of her."

11. During the course of Complainant's employment with Respondent, Simic would label Complainant a "freak of nature," a "freak," a "queer," and an "abomination."

12. The content of Simic's February 29, 2008, telephone conversation and the use of the same or similar derogatory terms from May 2004 to Complainant's separation on February 29, 2008, caused Complainant to lose "self-esteem," consider "suicide," "lose sleep," increase "fears," and "feel bad," experience heightened "depression" and "bi-polar" condition, until the "middle of 2009." At that point, she "started to see a therapist and started taking the right kind of medications."

13. During the course of employment with Respondent, Complainant netted "approximately \$300.00 per week."

14. After Complainant's employment separation from Respondent, she was employed at Alpha One Taxi & Livery ("Alpha One"). She worked at Alpha One from February 29, 2008, through January 11, 2009, when she was "involuntarily terminated." During the first three months of employment with Alpha One, Complainant earned \$600.00 gross salary per week and \$100.00 net salary. After the third month of employment with Alpha One, Complainant earned zero net pay until her separation on January 11, 2009. The total net income from Alpha One for the entire length of Complainant's employment was \$1,300.00.

15. In June 2009, Complainant was employed by Leyden Family Services Food Pantry ("Leyden"). Complainant worked at Leyden at the rate of \$8.25 per hour for 4 hours per week, for an income of \$33.00 per week for 68 weeks, for a total income of \$2,244.00.

16. On September 21, 2010, the U.S. Social Security Administration approved

Complainant's SSDI benefits, and from that date she stopped searching for employment and considered herself "retired."

17. Complainant retained attorney, Joanie Rae Wimmer, located in Downers Grove, Illinois, in April 2008, to represent her before the Department and Commission.

18. Complainant's attorney provided a proper affidavit listing the legal services she performed on behalf of Complainant.

19. The hourly rate for Joanie Rae Wimmer was \$175.00.

20. Joanie Rae Wimmer spent 104.40 hours on this matter.

21. The amount of legal fees is \$18, 270.00.

22. The requested hourly rate of attorney's fees, costs and number of hours expended for this legal matter are reasonable and customary in Northern Illinois.

23. Costs in this matter total zero.

CONCLUSIONS OF LAW

1. The Commission has jurisdiction over the parties and the subject matter.

2. At the time of the incidents complained of, Complainant was an "employee" as defined in Section 2-101(A) of the Illinois Human Rights Act ("Act") and was covered by the provisions of the Act.

3. At the time of the incidents complained of, Respondent was an "employer" as defined in Section 2-101(B) of the Act.

4. Respondent failed to comply with four discovery orders. On September 14, 2010, an order was entered granting Complainant's June 16, 2010, motion for sanctions. As a result, Respondent's January 6, 2010, motion to dismiss Complainant's complaint for lack of jurisdiction was denied.

5. Respondent failed to answer or respond to Complainant's complaint. On October 20, 2010, a default order was entered against Respondent. As a result of the default order, all the allegations contained in the complaint are deemed admitted as true.

6. In accordance with the default order, Respondent is liable for its violations of the Act that prohibit discrimination based on sexual orientation, related to gender identity in employment (Section 1-103(O-1)).

7. An argument based on the evidence cannot be made if the argument is an affirmative defense that should have been properly pled.

8. Complainant has proven by a preponderance of the evidence that she has suffered emotional distress from the actions of Respondent of such magnitude that she is entitled to an award of emotional distress damages.

9. A prevailing complainant may recover reasonable attorney's fees and costs.

DISCUSSION

Sexual Orientation, as Related to Gender Identity

As a result of the October 20, 2010, default order, there has been a finding of liability against Respondent. The allegations of the complaint are deemed admitted and Complainant's three claims of sexual orientation discrimination and harassment have been established. Therefore, it is not necessary to analyze the facts with the elements of the underlying causes of action. Based on the evidence, Complainant sustained actual damages.

Actual Damages

The Act provides for an award of actual damages. Section 5/8A-104(B). Actual damages include "indemnification for inconvenience, mental anguish, humiliation, embarrassment, expenses, and deprivation of Constitutional rights." Ayers and Johnson, IHRC, ALS No. 3375 (K), October 3, 1991, quoting Moorhead v. Lewis, 432 F. Supp. 674 (N.D. Ill. 1977).

Back Wages

It is the Commission's charge to make the prevailing complainant whole. Complainant is eligible for back wages consisting of the difference between what she should have received in salary, but for the discriminatory conduct of Respondent, and the amount actually received

through other employment during the applicable time period. Clark v. Illinois Human Rights Commission, 141 Ill.App.3d 178, 490 N.E.2d 29 (1st Dist. 1986); Brown and American Highway Technology, IHRC, ALS No.10805, January 2, 2003.

In calculating back wages, an employee should advance her theory of likely earnings along with supporting evidence. Id. If that showing is reasonable, the burden shifts to the employer to prove that the employee's earnings should have been less. Id.

Complainant was employed by Respondent as a taxi cab driver from March 23, 2004, through February 29, 2008, with an employment separation gap from November 21, 2007, through December 5, 2007. During the course of Complainant's employment with Respondent, she testified that she "netted approximately \$300.00 per week." ¹

After Complainant was discharged from Respondent on February 29, 2008, she was immediately hired on the same day with Alpha One in a comparable position, a taxi cab driver.

During the first three months of employment with Alpha One, Complainant testified that she earned \$600.00 gross salary and \$100.00 net salary per week. Complainant did not identify her salary's deductions. After Complainant three months with Alpha One, Complainant testified that she earned zero net pay, without further explanation. On January 11, 2009, Complainant was "involuntarily terminated" from Alpha One. During the hearing, Complainant was not asked about the underlying facts that led to her "involuntary termination."

Based on Complainant's testimony, the total "net" income from Alpha One for the entire length of Complainant's employment, February 29, 2008, through January 11, 2009, was \$1,300.00.

¹ Complainant did not testify as to the amount of her gross salary per week while employed with Respondent or specifically identify the deductions made to reach her net salary of "approximately \$300.00."

In June 2009, Complainant was employed by Leyden.² Complainant worked at Leyden at the rate of \$8.25 per hour for 4 hours per week, for an income of \$33.00 per week, for 68 weeks, until her self described retirement, for a total income of \$2,244.00.

On September 21, 2010, the U.S. Social Security Administration approved Complainant's SSDI benefits. Complainant testified at her hearing that she then "stopped searching for employment" and considered herself "retired."

Complainant calculated her requested back wages by using the following time lines and salary figures:

There were 133 weeks from the date Respondent discharged Complainant on February 29, 2008, through her retirement on September 21, 2010. If Complainant continued to work at Respondent during this time, making a net income of \$300.00 per week, she would have earned \$39,900.00.

From that figure, Complainant set off the salary earned at Alpha One from February 29, 2008, through January 11, 2009, of approximately \$100.00 per week. The total net income Complainant earned from Alpha One was \$1,300.00.

Finally, Complainant worked at Leyden from June 2009 through her retirement on September 21, 2010, and eared \$33.00 per week. Complainant worked there for 68 weeks for a total of \$2,244.00.

Complainant's requested amount of back wages is \$36,356.00. The amount is calculated by taking the total amount of income Complainant would have earned at Respondent through the date of her retirement and subtracting what she was able to earn from Alpha One and Leyden.

² Complainant did not testify as to her receipt of Illinois unemployment compensation or any other income from January 11, 2009, through June 2009. Unemployment compensation is not recoverable and must be subtracted from back pay total. Schuler and Sears Logistics Services, Inc., IHRC, ALS No. 5-315, September 21, 2006.

In calculating back pay, a complainant should advance his or her theory of "likely earnings along with supporting evidence." Shuler and Sears Logistics Services, Inc., IHRC, ALS No. 5-315, September 21, 2006, quoting Clark v. Illinois Human Rights Commission, 141 Ill.App.3d 178, 490 N.E.2d 29 (1st Dist. 1986). If that showing is reasonable, the burden shifts to the respondent to prove that the complainant's earnings should have been less. Id.

The Commission has held that quitting an interim job because the complainant simply did not like it, or for other personal reasons, serves to cut off damages. Brack and K-Mart Apparel Corporation, IHRC, ALS No. 5829, August 8, 1995. In this case, Complainant testified, without cross examination, that she was "involuntarily terminated" from Alpha One employment on January 11, 2009. However, no further information about the underlying facts of her separation from employment was volunteered by Complainant at the hearing. It is unknown if the termination was based on "zero net pay" after the first three month of employment with Alpha One ("hardship") or a "layoff" or a "job elimination" or "misconduct" or was her job "substantially different from his (her) previous job and complainant could not perform the duties as required." Id., Schuler, supra, and Hawley and Rosewood Care Center of Peoria, IHRC, ALS 7915(R), December 17, 1998.

In other words, "damages for back wages are cut off where there has been a substantial intervening cause which destroys any causal nexus between the complainant's wages and the original civil rights violation." Hawley, supra.

"When a party is mitigating his damages by taking an interim job, the party must use reasonable care to maintain that job." Brack, supra.

Mitigating factors were not revealed, because Respondent did not participate in the hearing.

"Failure to mitigate is an affirmative defense which must be pled and proven at the public hearing." Murphy and F.C. Financial Corp., IHRC, ALS No. 9522, December 10, 1997.

In this case, Respondent neither pled nor proved that Complainant did not mitigate her damages. The Respondent's failure to file an Answer or participate in these proceedings have left me without the benefit of cross-examination on the nature of Complainant's figures of gross and net pay, as well as employment separation from Alpha One. Therefore, the evidence of circumstances that usually justify a cut-off of back pay or set off of damages are limited here.

I must resolve all ambiguities, when calculating back pay, in favor of the prevailing Complainant. Clark, supra.

In the absence of any evidence to the contrary, it will be assumed that the complainant properly mitigated her damages and that the losses that she suffered were proximately caused by the civil rights violation.

As Complainant requested, it would be appropriate to award Complainant back pay until she started receiving SSDI benefits and retired on September 21, 2010. Duquoin Dairy Queen and Illinois Department of Human Rights, IHRC, ALS No.S-10499, November 24, 1998.³

Therefore, based on the discussion above, I recommend a back wages amount of \$36,356.00.

Emotional Distress

Complainant alleged she suffered emotional distress because of sexual orientation discrimination, related to gender identity, and requested an award to compensate her for this injury. The Act permits monetary damages for emotional distress, using the totality of the circumstances analysis. Village of Bellwood v. Illinois Human Rights Commission, 184 Ill.App.3d 339, 541 N.E.2d 1248 (1st Dist.1989).

³ "An employee is presumptively entitled to back pay from the date of an employee's wrongful termination until the date of the Recommended Order and Decision." Schuler, supra. On the record, Complainant testified that after being approved for Social Security benefits, she stopped searching for employment and retired. Complainant's calculation for back wages relief stopped on September 21, 2010. It appears to be appropriate to award Complainant back pay until she started receiving Social Security benefits on September 21, 2010. Duquoin Dairy Queen and Illinois Department of Human Rights, IHRC, ALS No. S-10499, November 24, 1998.

The “actual damages” provision of section 8B-104(B) of the Act includes damages for humiliation, embarrassment and mental distress. Ayers and Johnson, supra.

The act of violating a person’s civil rights, by itself, is insufficient to support an award for emotional distress damages. Garrity and Lockett, IHRC, ALS No. 6389, May 3, 1996. “The probative factors in determining the amount of an emotional distress award are the nature and duration of the suffering experienced by the complainant.” Gipson and H.P. Mechanical, Inc., and Steve Hathorne, IHRC, ALS No. 06-060C, August 3, 2007.

In Bellwood, supra, as here, no medical evidence was adduced. Although the allegations of the claims of sexual orientation discrimination, related to gender identity, are deemed admitted as fact pursuant to Section 8A-102(D)(4), and liability existed against Respondent pursuant to the default order of October 20, 2010, it is still a prerequisite to review the “nature and duration of the suffering” experienced by the Complainant prior to any recommendation of emotional distress damages.

The testimony of Complainant revealed that the “nature and duration” of Simic’s verbal attacks and discriminatory discharge were intentionally made to injure, embarrass and humiliate Complainant. These vile taunts, which extended over the course of Complainant’s employment, went to the very nature of Complainant’s sexual identity and sensitivity. Simic used such terms as “freak,” “abomination,” “queer” and “piece of shit,” to describe Complainant. Simic also volunteered that “... he felt sorry for her,” “that he was losing customers over the fact that she was a transsexual,” “the mechanics all thought she was a big joke and were laughing about her all the time,” and “he was glad to get rid of her.”

The Commission has held that the perpetrator of a civil rights violation takes its victim in the condition in which he or she is found. Morrow and Tummala, IHRC, ALS No. 05-229, October 22, 2007.

When asked to describe the effort in transitioning from one gender to another, Complainant compellingly testified, “It’s probably the most difficult thing that a person can do.”

Complainant was asked, "... [W]hen you have the courage to do that (transition) on the job and your fears become actualized and people start to call you an abomination and a freak, does that make it a lot deeper than ordinary name calling?" Complainant responded, "Yes, absolutely." In describing the impact of Simic's comments toward her, Complainant explained, "I did contemplate suicide on a number of occasions between 2008 and now." "There were nights that I couldn't sleep at all," which continued until "the middle of 2009" when Complainant went to "...see a therapist, see a doctor, and started taking the right kind of medications."

As a result of Simic's verbal attacks and comments, Complainant felt "bad" and "my (Complainant's) self-esteem was really low...But this blew my depression completely out of control where at times I was thinking suicide... [B]uild on my bi-polar." Simic, "... tried to place wedges between me and employees," because of Complainant's transition from male to female.

Complainant seeks an emotional damages award of \$50,000.00. It is difficult to quantify such emotional distress damages. Thus, a review of a couple Commission cases is in order.

In Kilpatrick and Lifetime Fitness, Inc., IHRC, ALS No. 05-011, April 27, 2005, the Commission awarded complainant \$15,000.00, for a public incident of race discrimination that had embarrassing rippling repercussions. The manager of respondent's fitness club loudly confronted complainant in the hot tub regarding payment of the entrance fee. Respondent had a pattern of being overly vigilant with African-American patrons. The police were called and complainant produced his receipt in front of other members to demonstrate that he had in fact paid for the use of the facility.

In Washington and Skyline Personnel, IHRC, ALS No. 10600, July 20, 1999, the Commission awarded complainant \$15,000.00, for verbal harassment and discharge from his position because of his diabetes. After Complainant arrived at respondent's office late, two supervisors, without addressing the real reason for tardiness, said that complainant was "sick and unreliable." Over the course of complainant's employment he was taunted as "you old

diabetic," he was not always able to take medical breaks and was mockingly told to "take some sugar."

In this case, in addition to verbal attacks discussed above, Respondent refused to pay for a defective starter and, on a second occasion, tow the taxi cab. As a result, Complainant had to pay for the starter and she was discharged for not towing her assigned cab into the shop at her expense. Complainant asked Simic, "Aren't you supposed to help me get this back in?" Simic replied, "In your case, no."

The weight of the evidence of the record, facts admitted by the default order and the testimony at the hearing concerning the nature and duration of the alleged acts of sexual orientation discrimination, related to gender identity, support an award for emotional distress significantly greater than the cases cited above.

In Kilpatrick, a case decided in 2006, one public incident of a discriminatory nature resulted in an award of \$15,000.00. In Washington, a 1999 case, the complainant was awarded \$15,000.00 for an extended sporadic history of name calling and employment interference.

Therefore, I find that an award of \$50,000.00 for emotional distress damages for the counts of sexual orientation discrimination, related to sexual identity in employment is fair and reasonable under all of the circumstances presented by this case.

Cease and Desist

Since a default order has been entered and there has been a finding of liability against Respondent, Universal Taxi Dispatch, Inc., it is recommended that Respondent be ordered to cease and desist from violating the Act in the future.

Prejudgment Interest

Respondent should be ordered to pay Complainant interest on the back wages. Section 8A-104(J).

Other Economic Damages

Complainant has requested and it is recommended that Respondent be ordered to reimburse Complainant \$85.00 for the repair of the cab's starter.

Attorney's fees and Costs

Since a finding was made that Respondent violated the Act and Complainant's damages have been determined, the only issue remaining is the amount of attorney's fees and costs that should be awarded to Complainant under Section 8A-104(G) of the Act.

Complainant's petition seeks \$18,270.00 in attorney's fees and zero in costs.

The purpose of the attorney's fee provision of the Act is to ensure that attorneys who practice before the Commission are adequately compensated for their services. Lieber and Southern Illinois University Board of Trustees, IHRC, ALS No. 884, September 25, 1987. In Clark and Champaign National Bank, IHRC, ALS No. 354(J), July 2, 1982, the Commission set out factors to consider when awarding fees and costs. The Commission looks to the experience of the attorney, the customary hourly fees for similar legal services in that locale, and the time spent furthering the case.

The Law Office of Joanie Rae Wimmer, specifically Joanie Rae Wimmer, had provided an adequate affidavit which established that the legal services it performed and the amount charged in fees were reasonable and customary for Northern Illinois. The firm performed 104.4 hours for Complainant's case since April 2008.

Therefore, the total amount of \$18,270.00 for attorney's fees is reasonable for this case.

The Act also authorizes recovery of costs as per Section 8A -104(G). Complainant's attorney does not claim out of pocket costs in this matter.

RECOMMENDATION

Based upon the foregoing, it is recommended that an order be entered sustaining the complaint and awarding Complainant the following relief:

1. Order Respondent to pay Complainant back wages in the amount of \$36,356.00,

plus prejudgment interest;

2. Order Respondent to pay Complainant \$40,000.00 as compensation for emotional distress;

3. Order Respondent to pay Complainant \$85.00 as reimbursement for her payment of her cab's starter;

4. Order Respondent to cease and desist from sexual orientation discrimination, related to gender identity in its employment practices;

5. Order Respondent to pay Complainant the amount of \$18,270.00 as attorney's fees in this matter.

HUMAN RIGHTS COMMISSION

BY: _____
WILLIAM J. BORAH
ADMINISTRATIVE LAW JUDGE
ADMINISTRATIVE LAW SECTION

ENTERED: March 24, 2011